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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 241

ALLISON BISHOPRIC, ET AL.,
Petitioners,

vs.

CITY OF JACKSON, ET AL.,
Respondents.

REPLY OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI

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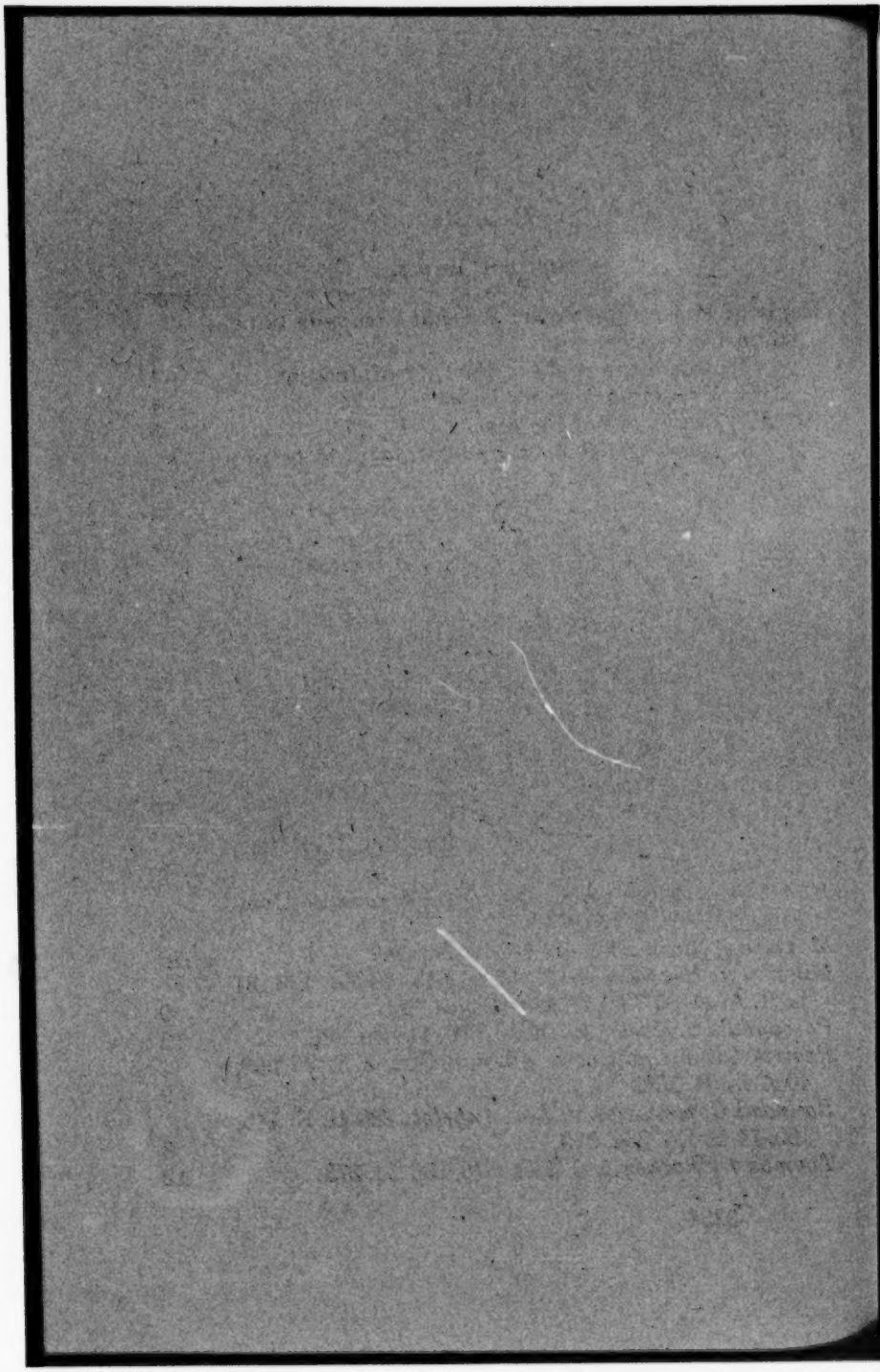

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I. Joinder in Reply of the City of Jackson.

Mississippi Power & Light Company, herein called "Power Company", adopts in its entirety the reply to said petition of the City of Jackson, herein called "City", and urges each point therein made, so far as applicable to Power Company, but due to the controversy wherein the Power Company is involved being separate and distinct from that wherein the City is involved, it is requisite that the Power Company supplement that reply of the City as is herein done.

II. Preliminary Remarks.

The City instituted suit against Allison Bishopric, Mark Twain Oil Company, W. B. Shaffer, herein called "Petitioners", and others, Cause No. 29,050, in the Chancery

Court of Hinds County (R., 1-34), whereto Power Company was a party, not being a party to or interested in No. 28,901, *J. L. Harper* v. *Allison Bishopric* (R., 40) except as garnishee as hereinafter set out, or No. 29,533, *Mrs. Louise Cross Simpson* v. *City of Jackson* (R., 73). The Power Company answered in No. 29,050 (R., 36), setting up the valid acquisition from the City of all gas produced by City from the wells in controversy, whereasto Petitioners sought to establish as against the City, in possession and operating, an undivided interest with an overriding royalty.

Petitioners filed a cross bill solely against the City (R., 49), whereto the Power Company was not a party, and prayed the City "be required to execute to * * * (Petitioners) a lease on its land and an assignment of all interest acquired * * * ; (3) after crediting * * * (Petitioners) * * * with any monies justly due it on said drilling operations * * * by (City) * * * that * * * (Petitioners) * * * be awarded a decree against * * * (City) * * * for their reasonable interest in all gas drawn from said wells and converted by * * * (City) * * * as aforesaid, calculated * * * at the reasonable price of 30¢ per m.c.f. *delivered at the gate of Mississippi Power & Light Company* in the aggregate present amount of $50,000.00, and that such rate or market price be decreed as reasonable." (R., 56)[1]

Thereafter, consolidation was had for trial (R., 73). The Power Company is a party in No. 29,050 only. There is no pleading against the Power Company by the Petitioners asking any relief whatsoever, though the City, in No. 29,050, whereto Petitioners were parties, sought recovery from the Power Company for the gas delivered from all wells. Had Petitioners objected thereto (the Power

[1] Italics ours unless otherwise noted.

Company not controverting the City's demand in the absence of objections by Petitioners), under local practice, this was the place whereat Petitioners should have so done. 9 *Miss. Digest*, Title "Judgment", especially Key No. 713 (2). Petitioners admitted in their Reply Brief in the Supreme Court of Mississippi on Suggestion of Error: "The court must bear in mind at this point that no issue was made in the trial court between appellants and Mississippi Power & Light Company of its wrongful and improper conversion and use of such gas under the circumstances. This appeal as against the utility was taken solely for the purpose of preserving such right to dispute such matter with the utility another day." (Page 2.)

J. L. Harper, a member of the partnership, instituted suit No. 28,901, against Allison Bishopric, et al., petitioners, and that in said suit sought to be garnished was the amount due by the Power Company to the City for the gas delivered from these wells by the City to the Power Company, whereasto, in that bill, not herein transcribed, Harper, co-partner, averred:

> "* * * Said City of Jackson * * *, acting for itself, for your complainant and for the defendants, Bishopric and Shaffer, entered into a gas purchase contract to sell all of the gas proceeds from said wells to the Mississippi Power & Light Company, * * * and * * * it was the intention of the City * * * to collect all of the proceeds from the working interest in said well and to retain 45% thereof and to distribute the remaining 55% thereof to your said complainant, Bishopric and Shaffer to be divided by them in accordance with said oral agreement. Your complainant is advised * * * that the City of Jackson * * * has in its hands amounts in excess of the sum of $2500.00 belonging to your complainant and the said Bishopric and Shaffer, and being one half of the proceeds collected by said City * * * from said * * * gas wells, plus a 5% overriding interest therein."

Notwithstanding, in this very suit the City was demanding payment and the Power Company not controverting its demand in view of the fact that Petitioners were making no claim whatsoever adverse to the Power Company by seeking recovery from the City for gas "delivered at the gate of Mississippi Power & Light Company". Compare *Home Insurance Company* v. *Tate Mercantile Company*, 117 Miss. 760, 78 So. 709.

This matter constitutes exclusively a question of local pleading and practice and in no sense a federal question. 28 *U. S. Code Ann.*, Sec. 344, Notes 81-86 and 274; French v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536. There being no issue against the Power Company, it did not defend against the City's demand for gas delivered and judgment was entered in favor of the City thereasto and against the Power Company. "It is ordered, adjudged and decreed that the Mississippi Power & Light Company pay over to the City of Jackson the sum of $41,061.42 and that this will be a full and complete release and acquittance for all gas purchased * * * under this contract * * *." (R., 194.)

The case thus made was tried by Mr. Morse, for the City, and Mr. Cox, for Petitioners. As to the issue of whether or not the transaction between Petitioners and the City (whereto the Power Company was not a party) was ultra vires, and if ultra vires, the admeasurement of the equity that the City would be required to do.

Thereafter, the Chancellor, in the controversy between Petitioners and the City, held (a) that the contract as to acquisition and operation of these gas wells was ultra vires, and (b) that the City pay Petitioners $20,322.21, (R., 191), and in the controversy between the City and the Power Company, that "the amount paid by the Mississippi Power & Light Company and the price received by the City of

Jackson * * * is the fair market value of said gas and that said price shall be and is the basis of payments to be made to the respective interest holders * * *." (R., 193.) "It is further ordered, adjudged and decreed that the purchase by the Mississippi Power & Light Company of the gas is and was in all respects legal and a valid * * * (and) * * * the Mississippi Power & Light Company pay over to the City of Jackson the sum of $41,061.42, and that this will be a full and complete release and acquittance for all gas purchased from the city * * *. It is further ordered, adjudged and decreed that the bill is in all other particulars dismissed as to the Mississippi Power & Light Company * * *." (R., 194.) This decree to be entered in each of the causes (R. 195).

So that at no time in the trial court did the Petitioners, as against the Power Company, propound any demand whatever for relief, the Power Company was not in any way a party to the ultra vires controversy between the City and Petitioners, and the Power Company did not appeal, Petitioners having in the trial court interposed as against the Power Company no claim whatever for this gas.

The Constitution of the United States was not mentioned in the trial court. Petitioners concede (Petitioners' Br., 6): "No constitutional question was presented or argued in the trial court."

III. Statement of the Case.

Having adopted the statement of the case made by the City and supplemented it under "Preliminary Remarks", supra, no further statement is essential, except Petitioners' statement thereof is inaccurate in these particulars:

(a) Petitioners claim (Pet., p. 2) express authority for the City to act under Chapter 280, Mississippi Laws 1940. The Chancellor held this transaction ultra vires

in a finding of fact inadvertently omitted from the record, but see, R., 192. The Supreme Court on the first hearing unanimously held it ultra vires (R., 196) and on the Suggestion of Error, it was held ultra vires by Judge Anderson (R., 203, et seq.), by Judges Alexander and Roberds (R., 207): "We think this contract is ultra vires and invalid because it was not authorized by, nor embraced within, said Chapter 280." And by Judges McGehee and Griffith (R., 211): "Which may, in some respects, be ultra vires, * * *." The Chief Justice, apparently, agreed with Petitioners (R. 208), the Court thus dividing five to one.

(b) Petitioners claim that the City entered into a contract with the Power Company for the output of these wells "*at a nominal price without seeking the best market therefor.*" (R., 30) (Pet., 2-3). As hereinbefore quoted, the Chancellor found these contracts valid, conceded by Petitioners (Pet., 13), and under evidence from disinterested witnesses, L. P. Love (R., 182), Frank Tatum, (R., 183), that full value was obtained by the City for the output of these wells when, after a long delay, they were connected to the distribution system.

(c) Petitioners claim that the contracts were fully performed. With deference, the record does not so show.

(d) It is claimed that the question of the Constitutionality of Section 280 was improperly raised for the first time in the Supreme Court. But Constitutional questions appearing upon the face of the record may be raised at any time, even *sua sponte* by the Court. The State Supreme Court did withdraw its first opinion, but the predicate therefor was not that Chapter 280 was not a local law, but that when the Lieutenant-Governor and Speaker of the House signed the bill, they were assumed to have seen

to it that the bill had been referred to the Committee provided for in Section 89, and that if they violated this Section, the Court would presume that compliance had been had, notwithstanding they knew off the record it had not. The presumption of conformity by the Legislature was conclusive, under Mississippi decisions, on the court.

So that, while it is true that Chapter 280 was allowed to stand, it stood not on its merits, but only by reason of this presumption.

(e) It is claimed that Judge Anderson held "that Petitioners' contract was ultra vires and void because it violated Section 183, Mississippi Constitution of 1890, *with two Justices concurring.*" With deference, Judge Anderson held (R. 203) that "What took place between the parties under the statute violated Section 183 of the Constitution and * * * amounted to a surrender by the City of part at least of its governmental powers * * * both of these grounds are well founded." And then, in support of the ultra vires contention, relied upon *Ampt* v. *Cincinnati*, 56 Ohio St. 47, 46 N. E. 69, and other cases.

Judges Alexander and Roberds did not pass on whether or not Chapter 280 violated Section 183, nor did they construe Section 183 as applicable "to the situation here," but held solely the transaction ultra vires (R., 207). And in this holding, in part at least, Judges Griffith and McGehee concurred (R., 211).

(f) Three Judges of the Court did not dissent as to the ultra vires holding maintained by Judges Anderson, Alexander and Roberds. Judges McGehee and Griffith concurred in this ultra vires holding in part, and the Chief Justice disagreed, but that which divided Mississippi's court was not the question of ultra vires, vel non, but assuming the transaction to be ultra vires, what was the

City required to do for Petitioners in this ultra vires transaction. Three Judges held that doing equity required only the return of the actual consideration paid. The other three held that restitution, substantially as though the contract was being enforced, was requisite, but that whereon the Court divided was not in any sense a federal question, being one only of general law.

(g) Petitioners claim "* * * no factual justification or support in this record" (Pet., p. 4). But, with deference, the facts are admitted not to be substantially in dispute, and it is unquestioned that five of the Judges of the Court held the transaction ultra vires, with one Judge dissenting. This was strictly a local question, and apparently as to ultra vires, vel non, Petitioners do not seek to assign it as a federal question. Did they so do, however, their claim is baseless.

"This Court is bound by the decision of the highest Court of the State as to the powers of their municipalities. *Georgia R. & Power Co.* v. *Decatur*, 262 U. S. 432, 438 * * *." *Railroad Commission* v. *Los Angeles*, 280 U. S. 145, 152, 74 L. Ed. 234, 310.

IV. Questions Claimed by Petitioners to Be Presented.

In the Petition for Certiorari, opposite counsel make no mention of the Power Company when they advert to the alleged contravention of the Fourteenth Amendment, and properly so, as no federal question was asserted against the Power Company either in the Chancery Court or in the State Supreme Court. This failure to mention a federal question between the Power Company and the Petitioners was eminently proper because:

(a) No pleading by Petitioners against the Power Company in Cause No. 29,050;

(b) No possible federal question involved as between Petitioners and the Power Company, because

(1) The City being confessedly the owner of an undivided half interest in the gas, which was being produced from wells by it sunk, had, under State law, the right of disposition. "A cotenant of mineral lands or mines has a right to develop the same and remove the minerals, even without the consent or approval of the other cotenants." 36 *Am. Juris.*, "Mines & Minerals," Sec. 169, p. 398; *Prairie Oil & Gas Co.* v. *Allen*, 8 Cir., 2 F. 2d 566, 40 A. L. R. 1389; *Earp* v. *Mid-Continent Pet. Corp.*, 167 Okla. 86, 27 Pac. (2d) 855, 91 A. L. R. 188.

(2) Having sought an accounting against its cotenant, the City, for gas allegedly wrongfully disposed of by the City to Power Company, under a contract which was held valid and as vouchsafing full value, Petitioners are estopped to claim against the Power Company that whereasto they asked the City to afford rectification. Petitioners may not blow hot and cold. Equitable estoppel is never a federal question.

Petitioners made no monetary demand against the Power Company by any pleading, but knowing of the disposition to the Power Company by the City, and the price whereat this disposition was had, Petitioners demanded an accounting in equity against their alleged cotenant, the City, for the full value of that sold "without regard to the price at which the City sold said gas to * * * Power Company." Having thus sued, Petitioners cannot hereafter consistently demand any judgment against the Power Company for wrongfully purchasing the gas sold by the City to Power Company. This constituted an election of remedies.

Compare *Murphy* v. *Hutchinson*, 93 Miss. 643, 48 So. 178, 21 L. R. A. (NS) 785, 17 Ann. Cases, 611; *Edwards*

v. *Edwards* (Miss.), 11 So. 2d 450, 452; 6 *Miss. Digest*, Title "Election of Remedies," Key No. 3, p. 146.

In 28 *C. J. S.*, 1069, it is said:

> "Actions proceeding on the theory that title to property is in one party are inconsistent with those proceeding on the theory that title is in another party."

In 18 *Am. Jur.*, Sec. 12, p. 135, it is said:

> "It has been said that the so-called 'inconsistency of remedies' is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of a certain remedy is inconsistent with, and repugnant to, another certain state of facts relied on as the basis of another remedy."

A question of estoppel is local, not federal.

V. Petitioners' Reasons for Granting Writ.

Hereunder, Petitioners devote themselves exclusively to the matter of the $18,637.13 and the $1,800.00 (R., 182) in controversy between the City and Petitioners and whereasto the Power Company has no place, and even conceding that, by imagination, there might be a Federal question therein, it did not affect the Power Company in any way.

VI. Petitioners' Statement of the Case.

We advert to the statement of the case as made by the City and, with deference, challenge as inaccurate, for the reasons therein and herein shown, the statements made in conflict with that herein and therein claimed.

VII. Petitioners' Assignment of Error and Argument.

1. Assignments 1 and 3 should be grouped together. They are:

> "(1) That Section 183, Mississippi Constitution 1890 was and is in nowise involved.

"(3) That the decision of the court is predicated on a supposed fact not to be found in this record to the effect that the municipality thereby lent its credit to petitioners in violation of Section 183 of the Constitution, and its decision is arbitrary and thereby deprives these petitioners of their property without due process and in violation of the equal protection clause of the Federal Constitution."

Whereto, the Power Company replies and submits that no jurisdiction attaches here because:

(a) For the reasons assigned by the City in its reply.

(b) The Power Company was not, directly or indirectly, a party to or interested in this aspect of the litigation, having been voluntarily eliminated therefrom by Petitioners' voluntary action in suing their alleged co-tenant, the City, for the gas delivered by the City to the Power Company.

(c) Judge Anderson alone made reference to Section 183 of the Constitution. Five Judges held specifically that this transaction was *ultra vires*, and thereby this being a local question, the decision of the Supreme Court, which did not advert to any Federal question, is conclusive here, and not subject to review under the statute.

2. Petitioners next assign:

"(2) The court erroneously cancelled said contracts in suit after full performance thereof and while the municipality then and now continues to enjoy the fruits thereof, without requiring it to do equity as a prerequisite thereto."

Our reply to this assignment is likewise no jurisdiction attaches because:

(a) For the reasons assigned by the City in its reply.

(b) This assignment deals exclusively with the contracts "cancelled" and with the failure of the State Courts in not requiring the City "to do equity as a prerequisite thereto". As shown, the Power Company was not a party to this aspect of the controversy. No relief therein or thereasto was in any way against Power Company prayed.

(c) If there were a Federal question raised whereto Power Company was a party it was raised too late, the State Supreme Court in no way adverting to any Constitutional question. 28 *U. S. Code Ann.*, Sec. 344, Note 221, p. 282.

(d) Mississippi's court deleted completely *Feemster* v. *City of Tupelo*, 83 So. 804, 121 Miss. 733, in good faith and completely from the basis upon which it affirmed the Chancellor's decision. It thus accorded to Petitioners full relief as to their claim under the *Feemster* case. They may not herein complain of an error made in their own favor for, with deference to the State Supreme Court, the right thus accorded Petitioners very possibly contravenes prior Mississippi decisions. Compare *Monette* v. *State*, 91 Miss. 662, 44 So. 989; *Pascagoula* v. *Krebs*, 151 Miss. 676, 118 So. 286; *Toombs* v. *Sharkey*, 140 Miss. 676, 106 So. 273.

(e) Having had a full hearing in the trial court and a full hearing in the Supreme Court, Petitioners under the Constitution are not entitled to any further hearing. The function of this Court never has been to grant a second appeal where the parties have had a full hearing.

The right to appeal in fact, itself, is statutory and not constitutional. 4 *C. J. S.*, Title "Appeal and Error", Sec. 1, 18, 2 *Am. Jur.*, Title "Appeal and Error", Sec. 5, 6.

WHEREFORE, it is respectfully prayed, that insofar as the controversy here between Petitioners and the Power Company, there be no writ of Certiorari. Petitioners have filed

no pleading against the Power Company. Petitioners have waived any possible Constitutional question when they interposed no demands against the Power Company but allowed the City to recover a judgment for all gas furnished, claiming in this suit no title thereto.

Respectfully,

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